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No. 01-1104

IN THE

Supreme Court of the United States

RANDALL W. HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In its Opposition ("Opp."), the government unequivocally endorses the application of a "responsible corporate officer" instruction in knowing endangerment and other serious felony prosecutions under the Resource Conservation and Recovery Act (RCRA). It seeks this Court's imprimatur on use of the instruction in future corporate officer felony prosecutions through denial of review in this case, suggesting that the court of appeals' passing recitation of the correct "actual knowledge" standard makes this case less worthy of the Court's attention. Opp. 10.

To the contrary, the Eleventh Circuit's internally inconsistent holding underscores rather than explains away the need for this Court's guidance. Precisely because the court upheld a "supervisor liability" instruction[1] that permitted conviction based on corporate status and a mere failure to detect or correct, but then simultaneously paid lip service to the statute's explicit and exacting "actual knowledge" standard, this case compounds the already pervasive confusion in the jurisprudence of corporate officer criminal liability, particularly in the environmental context.

While the government now denies that the lower courts' rulings implicated the "public welfare"[2] or "responsible corporate officer" doctrines, the principal authority the government cited in support of its "supervisor liability" instruction at trial was *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), the cases out of which those doctrines arose. App. 99a-100a. By

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[1] Throughout its brief, the government studiously avoids the words "responsible corporate officer," preferring the moniker "supervisor liability." Yet even the court of appeals captioned part of its discussion "Reasonable [sic] Corporate Officer." App. 49a.

[2] The district court expressly held that the relevant statutes were indeed "public welfare statutes." 01-1112 Pet. App. 93a n.12.

now refusing to acknowledge the genesis and implications of the instruction, the government fails to address the split in the circuits regarding the degree to which the statutorily mandated *mens rea* can be eroded by application of the "public welfare" doctrine, an erosion cautioned against by Justices Thomas and O'Connor in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).[3]

The government's arguments to this Court signal its support for "responsible corporate officer" liability even in knowing endangerment cases for which Congress has demanded the most exacting scienter requirements. The Court should not permit such a dramatic departure from fundamental precepts of criminal liability to creep into the law *sub silentio.*

I. THE GOVERNMENT ADVOCATES AN ERODED *MENS REA* FOR CORPORATE OFFICERS

The court of appeals held that the district court properly instructed the jury to convict petitioner of "knowing endangerment" if he "had a responsible relation to the violation," "had the power or capacity to prevent the violation," and "acted knowingly in failing to prevent, detect or correct the violation." App. 95a. The government endorses this standard of status-based liability, which bears no relation to RCRA's heightened culpability requirements, especially for knowing endangerment.

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[3] Not only have commentators noted the jurisprudential quagmire presented by the level of "knowledge" required in environmental crimes; the circuits are clearly split over whether the "public welfare" doctrine is applicable in such cases. *See generally* Brief *Amici Curiae* of The Business Roundtable, The National Association of Manufacturers, and The American Petroleum Institute, at 10-11, 15-18.

A. The Government Ignores that Congress Mandated a Stringent Model Penal Code Definition of Knowledge.

The government first argues that the district court's instruction was proper because "it is impossible for a supervisor to 'act knowingly' in failing to prevent or correct a violation without being aware of that violation." Opp. 12. The argument is facially illogical; anyone—especially a senior corporate executive—can easily go consciously about his business yet fail to prevent a violation. More importantly, Congress itself rejected the government's position by imposing the Model Penal Code's most rigid definition of a "knowing" state of mind on RCRA's knowing endangerment statute, defining the requisite *mens rea* as the actual expectation of likely results of a defendant's conduct, not merely knowing the "nature" of his conduct. Pet. 20 n.19, 21-23.

Following the tiered approach of Section 2.02(2)(b) of the Model Penal Code, RCRA distinguishes what constitutes a "knowing" state of mind in relation to each separate object element of the offense. 42 U.S.C. §§ 6928(f)(1)(A)-(C). Thus, RCRA establishes on its face that a person can act "knowingly" with respect to his conduct, by having a general "aware[ness] of the nature of his conduct," § 6928(f)(1)(A), yet only act "knowingly" with respect to the *results* of his conduct if he has an actual "aware[ness] or belie[f] that his conduct is substantially certain to cause danger of death or serious bodily injury." § 6928(f)(1)(C). The district court defined "acted knowingly" under the lesser standard—effectively, consciously going about one's business. Pet. 14, 19, 22. Yet, when applying a statutory scheme derived from the Model Penal Code's definition of "knowingly" to such crimes, courts must require strict proof of a "knowing" state of mind with respect to *results* of conduct. *See, e.g.*, *State v. Lambert*, 929 P.2d 846, 849 (Mont. 1996); *People v. Curtis*, 627 P.2d 734, 736-37 (Colo. 1981). The government's

reliance on the words "acted knowingly" in the instructions at issue does not come close to requiring proof that petitioner acted with actual knowledge of the likely results of his conduct as mandated for knowing endangerment.[4]

The result of "responsible corporate officer" liability—by whatever name—is to impose felony penalties on conduct that the district court below (Pet. 12), and the government itself, describe in the language of negligence. Opp. 12 n.3 (emphasizing the court of appeals' holding that "[e]ach of the substantive offenses were foreseeable consequences of the [petitioners'] agreement to continue operating the plant"); R14-235-6 (trial judge describing petitioner's conduct as having "failed to act in an appropriate and reasonable manner when various violations were reported to him"). RCRA does not contain a provision that criminalizes negligence. The Clean Water Act ("CWA") does, but that provision was not charged in this case. Notably, another court affirming this very instruction erroneously reasoned that "[n]egligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and § 6928(d) makes such egregious conduct a crime." *United States v. Dee*, 912 F.2d 741, 746 n.8, 747 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).[5]

The disregard of RCRA's heightened knowing endangerment elements in this case affords the Court the opportunity to resolve the circuit split as to whether the most serious environmental felony statutes such as RCRA and the CWA represent "public welfare statutes" that—*in the words of the district court in this case*—"are generally subject to less stringent *mens rea* requirements than more traditional criminal

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[4] Contrary to the government's argument (Opp. 11-12, 14) that the responsible corporate officer instruction was not an alternative basis for liability, the instruction facially reads as an element-based stand-alone basis for liability. Pet. 13 n.13.

[5] The government advised the trial court that the same instruction had been given in *Dee*. App. 100a.

laws." 01-1112 Pet. App. 93a n.12.[6] The Court can thereby also answer the question—expressly reserved in *Staples v. United States*, 511 U.S. 600, 618 (1994)—whether felony crimes can be characterized as public welfare offenses. *See* Brief *Amici Curiae* of The Business Roundtable, *et al.*, at 14.

B. "Knowing Failure to Detect" Is Not Deliberate Avoidance.

The government next attempts to square the lower courts' "failure to detect" standard with RCRA's actual knowledge standard, arguing that the phrase "acted knowingly in failing to . . . detect" properly instructed the jury on the elements of deliberate avoidance, and thus equated with actual knowledge. Opp. 13.[7] The very cases that the government cites, *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976), and *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990), make clear that the instruction given omitted the necessary elements of a deliberate avoidance instruction. Most fundamentally, it failed to require proof of "a conscious purpose to avoid learning the truth," *Jewell*, 532 F.2d at 704, or "[a] deliberate effort to avoid guilty knowledge." *Giovannetti*, 919 F.2d at 1228. As this vocabulary suggests, the *mens rea* for deliberate avoidance requires a "purposeful" or "deliberate" state of mind bent on "avoiding" confirmation of suspected incriminating facts.

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[6] The government advises the Court that petitioner contends that this argument applies to CERCLA claims as well. Opp. 11 n.2. Petitioner was not even indicted for CERCLA claims and has made no arguments regarding CERCLA in any respect at any time.

[7] The "responsible corporate officer" instruction was not proffered to the trial court as a deliberate avoidance instruction. Neither *Dotterweich* nor *Park*, nor the other decisions the government cited to support the instruction, discuss deliberate avoidance. App. 99a-100a. The court of appeals also never alluded to the concept in its opinion below.

The "responsible corporate officer" instruction did not require proof that petitioner acted purposely or deliberately to avoid obtaining knowledge. The Model Penal Code clearly differentiates between acting "purposely" and acting "knowingly." *See* Model Penal Code §§ 2.02(2)(a)-(b) (Proposed Official Draft 1962). A person "acts purposely" only when, *inter alia*, "it is his conscious object . . . to cause" a particular result. § 2.02(2)(a)(i). Deliberate avoidance thus requires proof that it was a defendant's "conscious object . . . to cause" his own ignorance. The "responsible corporate officer" instruction required no such "purposeful" state of mind for conviction and cannot now be rationalized as a deliberate avoidance instruction.

C. The Government Sponsors an Erroneous "Failure to Correct" Standard.

The government next attempts to defend the lower courts' erroneous "failure to correct" standard, arguing that it did not permit conviction for after-the-fact knowledge because "a violation can only be corrected while it is ongoing." Opp. 13. The government appears to overlook the retrospective nature of environmental "remediation," which can drag on for years after violations occur. Under the "failure to correct" standard of criminal liability adopted below, the jury could have convicted petitioner if he first became aware of the plant's alleged violations at the time of his indictment in 1998, but "failed" to "correct" them by not subsequently contributing to the site's Superfund clean-up efforts.[8] This logic cannot be squared with the statutory requirement that the defendant knowingly cause the violations.

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[8] The government also ignores that not all of the counts in the indictment allege continuous violations. For example, counts 26 through 32 allege seven specific illegal disposals of wastewater under RCRA, which petitioner allegedly caused by allowing wastewater to flow out of the plant on seven specific days at various times throughout 1993. R1-35.

D. Petitioner Was Denied His Due Process Right to a Trial Under the Proper Legal Standard.

To deflect attention from the "responsible corporate officer" instruction, the government emphasizes the Eleventh Circuit's correct recitation of RCRA's actual knowledge standard during its review of the sufficiency of the evidence, when the court necessarily evaluated the record in the light most favorable to the government. Opp. 10. This Court should find no solace in a systemic discrepancy between the law applied at trial and the law on appeal, which would deny the accused his constitutional right to have the evidence against him considered by the jury under the correct legal standard with the benefit of the reasonable-doubt standard.[9] Simply put, the appellate court's sufficiency review cannot undo the denial of petitioner's right to a fair trial any more than it will deter future prosecutors and courts from using the same instruction.

II. THE GOVERNMENT SIDESTEPS THE UNJUSTIFIED SPLIT BETWEEN CIVIL AND CRIMINAL INTRACORPORATE CONSPIRACY LAW

The government opposes petitioner's conspiracy argument without acknowledging this Court's decision that in some cases conspiracy liability will not lie for wholly intracorporate conduct, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), or the subsequent use of the intracorporate conspiracy doctrine to preclude liability of corporate actors beyond the antitrust context, *see* Pet. 27-28. In addition, the government gives no explanation why the doctrine should be applied to shield corporate employees

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[9] Petitioner vehemently denies the government's mischaracterization of the evidence in its opposition brief, but understands that this Court is not the forum in which to resume that debate.

from liability for wholly intracorporate conspiracies to violate civil rights, but not to preclude liability for wholly intracorporate conduct implicating environmental violations, despite a nearly identical statutory context. *Compare* 42 U.S.C. § 1985 *with* 18 U.S.C. § 371 (both requiring that "two or more persons" conspire).[10]

While the government suggests otherwise, the application of the intracorporate conspiracy doctrine to corporate employees is far from uniform among circuit courts. *Compare McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038-39 (11th Cir. 2000) (en banc) (holding doctrine inapplicable to criminal conspiracy under § 1985(2) because it involved the same criminal wrongdoing as under § 371) *with Wright v. Ill. Dep't. of Children & Family Servs.*, 40 F.3d 1492, 1507-08 (7th Cir. 1994) (applying intracorporate conspiracy doctrine to criminal conspiracy under § 1985(2)). *See also Tripp v. Executive Office of the President*, 200 F.R.D. 140, 150 (D.C. Cir. 2001) (noting disagreement among the federal circuits regarding the applicability of intracorporate conspiracy doctrine to § 1985 claims). *See generally* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399, 443-45 (1998).[11]

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[10] The government's argument that the text of 18 U.S.C. § 371 allows for conviction also overlooks this Court's own refusal to impose liability even when statutory language facially covers intracorporate conspiracies. *See Copperweld*, 467 U.S. at 769 (noting that the literal meaning of the Sherman Act would seemingly apply to wholly intracorporate conduct).

[11] The government's citation to this article is misleading. For example, it cites to footnote 250 as support for the suggestion that the author's criticisms apply only to entity liability, *see* Opp. 19; however, it fails to include Professor Martin's statement that many of the textual, precedential, and policy-based contentions used to critique entity liability may be used to challenge individual liability for corporate behavior, which is precisely petitioner's point.

No court, and certainly not the government in its opposition, has adequately explained why criminal liability should be imposed on corporate employees for participating in intracorporate environmental decisionmaking, while the same employees working within the scope of their employment would not be held liable if they actively conspired to violate an individual's civil rights. Similarly, the contradiction inherent in imposing imputed "supervisor liability" for the corporation's environmental crimes, while disregarding the principle of corporate unity under the intracorporate conspiracy doctrine, begs for clarification by this Court.

III. PETITIONER RAISED HIS CLAIMS BELOW

Inexplicably, the government argues that the Court should not hear some of petitioner's arguments because they were not made below. Opp. 12, 18. This Court's "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). All of petitioner's arguments were explicitly raised below or are directly in support of federal claims properly presented below, including his claim that the "responsible corporate officer" instruction eviscerated the statutory *mens rea* requirement,[12] and his claim that the evidence of his intracorporate conduct did not suffice to support his conspiracy

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[12] *See, e.g.*, Brief of Appellant Randall W. Hansen (filed October 4, 1999), at 46 (point heading: "II.B. The Trial Court Erred in Giving the Jury an Alternative Responsible Corporate Officer Instruction Which had the Effect of Removing the Scienter Requirements from the RCRA and CWA Statutes"), 52 (point heading: "II.C. The Responsible Corporate Officer Instruction Eviscerated the Heightened 'Knowing' Requirements of RCRA's Knowing Endangerment Statute and Allowed the Jury to Convict Randall Hansen Without Making the Requisite *Mens Rea* Determinations").

conviction.[13] It is hard to imagine what more petitioner could have done to preserve his arguments. Because petitioner "can make any argument in support of" his properly presented federal claims, all argument in his Petition conforms with this Court's traditional rule. *See, e.g.*, *Lebron*, 513 U.S. at 379; *Yee*, 503 U.S. at 534.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] *See* Reply Brief of Appellant Randall W. Hansen (dated January 18, 2000), at 21-22 (citing *Copperweld* and an article on intracorporate conspiracies under Section 1985 and advancing policy-based rationales for not imposing intracorporate conspiracy liability in the environmental context). The Eleventh Circuit has also repeatedly passed on the question of intracorporate liability under 18 U.S.C. § 371, as in its unanimous *en banc* decision in *McAndrew*, 206 F.3d at 1038-39, which was decided during the pendency of petitioner's appeal.